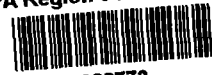


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EPA Region 5 Records Ctr.



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## **EPA Superfund Explanation of Significant Differences**

**OUTBOARD MARINE CORPORATION  
EPA ID: ILD000802827  
OU2 (WAUKEGAN COKE PLANT)  
WAUKEGAN, IL  
September 28, 2004**

## EXPLANATION OF SIGNIFICANT DIFFERENCES

Waukegan Manufactured Gas and Coke Plant Site

Operable Unit #2 of the  
Outboard Marine Corporation Superfund Site  
Waukegan, IL

Brief summary: EPA is issuing an Explanation of Significant Differences to the Record of Decision for the Waukegan Manufactured Gas and Coke Plant site to denote a change in two soil contaminant cleanup levels and the projected future land use(s) of the site if the operation and maintenance of the soil remedy is performed in accordance with the provisions of the Remedial Action Consent Decree (August 2004).

**Explanation of Significant Differences  
Outboard Marine Corporation Superfund Site  
Operable Unit #2**

**I. Introduction**

**A. Site Name and Location**

Outboard Marine Corporation  
Operable Unit 2 - Waukegan Manufactured Gas and Coke Plant site  
Waukegan, Illinois

**B. Identification of Lead and Support Agencies**

Lead Agency: U.S. Environmental Protection Agency (EPA)

Support Agency: Illinois Environmental Protection Agency (Illinois EPA)

**C. Statement of Purpose**

This decision document sets forth the basis for the determination to issue an Explanation of Significant Differences (ESD) to the September 30, 1999, Record of Decision (ROD) for the Waukegan Manufactured Gas and Coke Plant (WCP) site, Operable Unit #2 of the Outboard Marine Corporation, Inc. (OMC) Superfund site, Waukegan, IL.

**D. Statutory Basis for Issuance of the ESD**

Section 117(c) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>1</sup> states that EPA shall publish an explanation of the significant differences between the remedial action being undertaken at a site and the remedial action set forth in the Record of Decision (ROD) if we determine that the remedial action at the site differs significantly from the ROD remedial action. We shall also publish the reasons such changes are being made. EPA policy and regulations<sup>2</sup> indicate that an ESD, rather than a ROD amendment, is appropriate where the changes being made to the remedial action are significant but do not fundamentally alter the overall remedy with respect to scope, performance, or cost.

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<sup>1</sup> 42 U.S.C. § 9617(c)

<sup>2</sup> See 40 CFR 300.435(c) (National Contingency Plan); EPA Office of Solid Waste and Emergency Response Directive 9355.3-02

## **E. Summary of Circumstances Necessitating this ESD**

The WCP site potentially responsible party (PRP) group and the city of Waukegan (City) proposed that EPA make several changes to the ROD remedial action for the WCP site. The PRP group proposed that we lower two soil contaminant cleanup levels set forth in the ROD. The City proposed that we change the projected future land use(s) of the site in accordance with the provisions of the Remedial Action Consent Decree (August 2004). The proposed changes are discussed below in Section III.

## **F. Agency Determination**

EPA, in consultation with Illinois EPA, has reviewed the proposed changes to the WCP site remedial action in accordance with CERCLA and EPA policy and guidance. We have determined that the proposed changes to the ROD remedial action are significant but do not fundamentally alter the overall site remedial action with respect to scope, performance, or cost. Thus, we find that it is appropriate that we issue an ESD to document the changes.

## **G. Administrative Record**

In accordance with Section 300.435(c) of the National Contingency Plan, this ESD and supporting documentation will become part of the Administrative Record for the WCP site. The Administrative Record is available for public review at the following locations:

EPA Region 5 Records Center  
77 W. Jackson Blvd. - 7<sup>th</sup> Floor  
Chicago, IL 60604  
8 a.m.-4 p.m. M-F

Waukegan Public Library  
128 N. County St.  
Waukegan, IL 60085  
9 a.m.-9 p.m. M-Th, 9-6 F, 9-5 Sat, 1-5 Sun

## **II. Location and Site History, Contaminants, and Selected Remedy**

### **A. Location and Site History**

The WCP site is a 36-acre property located on Waukegan Harbor at about 200 Sea Horse Drive in Waukegan, Illinois (see Figure 1). The site is operable unit #2 of the OMC National Priorities List (NPL) site. The Waukegan Harbor area consists of various commercial and industrial properties and the harbor serves both commercial shipping interests and recreational boaters.

The WCP site was developed in 1908 and initially was the location of a railroad tie-treatment plant. The tie plant was dismantled sometime after 1917. From 1928 until 1969 several owners operated a manufactured gas and coke production plant on the site. The property was sold to OMC in the early 1970s and OMC demolished the coke plant structures in 1972. OMC then used the site for public parking, snowmobile testing, and fire-fighting training purposes.

OMC began the cleanup of PCB-contaminated sediments in the adjacent Waukegan Harbor site (operable unit #1) in 1990. Because former boat Slip 3 (see Figure 2) was also contaminated, OMC planned to convert it into an on-site PCB containment cell to hold dredged harbor sediment that contained moderate levels of PCBs. Before OMC converted former Slip 3 into a containment cell it excavated a new boat slip for the adjacent marina. These excavated soils contained creosote and after a site inspection the WCP site was added to the OMC NPL site as operable unit #2 in mid-1990.

EPA began a two-phase, PRP-lead, remedial investigation/feasibility study (RI/FS) at the WCP site in 1992. We completed the FS in November 1998 and issued a proposed cleanup plan in February 1999. After a 60-day public comment period, we issued the WCP site ROD on September 30, 1999.

#### B. Contaminants and Selected Remedy

Soil contaminants of concern at the WCP site include polyaromatic hydrocarbons (PAHs), creosote, and arsenic. Groundwater contaminants of concern include arsenic, benzene, phenol, and ammonia.

EPA selected a remedial action that calls for the cleanup of site soil and groundwater to meet risk-based cleanup levels derived from a commercial/industrial future land-use scenario. We determined that a commercial/industrial future land-use scenario was appropriate because OMC owned the site and was operating its adjacent lakefront factories (see Figure 2) amongst several other lakefront industrial concerns.<sup>3</sup>

The PAH and creosote-contaminated soil will be excavated and treated by power plant co-burning or disposed of at a solid or hazardous waste landfill. Although treatment is the preferred method of dealing with the soil contaminants, placement of the PAH soils in a landfill may occur if treatment is deemed to be not practicable during the remedial design stage. The arsenic-contaminated soil will be stabilized or solidified in place. A 6-inch to 10-inch clean soil cover will be placed over the site areas that contain residual contaminants to further address potential dermal contact risks to future site users.

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<sup>3</sup> The City had commented on the proposed plan that it believed a residential future use scenario was more desirable; however, the comment was not delivered to us until after we had issued the ROD.

The groundwater contaminant plume will be cleaned up using a combination of pump and treat technology and monitored natural attenuation (MNA). The pump and treat system will be a cell-based, low-flow extraction system. Groundwater will be pumped to a biological treatment system to reduce the contaminant levels and the treated water will be reinjected along the perimeter of the extraction cell. Once an estimated 80 percent of the contaminant mass has been removed we will begin the MNA phase. We will monitor groundwater quality at the site until it meets federal and state drinking water standards.

Institutional controls (e.g. site-use restrictions, deed restrictions, groundwater-use restrictions, and utility easements) will also be placed at the site. A Soils Management Plan (SMP) will also be developed to assist in future land-use decision making with respect to residual soil contaminants at the site.

The estimated capital cost of performing the selected remedial action in September 1999 was \$14 million, with an estimated present worth O&M cost of nearly \$11 million, for a total cleanup cost estimate of \$25 million.

### **III. Basis for the ESD**

EPA selected the WCP site remedial action based upon a commercial/industrial future land-use assumption because OMC, the site owner, was (seemingly) operating as a viable corporate entity in September 1999. Shortly thereafter OMC declared bankruptcy<sup>4</sup> and since then the U.S. Bankruptcy Trustee (Trustee) has either sold off or abandoned all of OMC's property holdings in Waukegan. The City purchased the WCP site property from the Trustee in July 2001 and, as the new site owner, indicated that it wanted to redevelop the property for mixed commercial, residential and marina-related uses in accordance with its emerging lakefront-wide redevelopment plan.

Meanwhile, the WCP site PRP group, because questions had arisen relating to emerging vapor-intrusion risk issues at Superfund sites, prepared a Technical Memorandum (Barr Engineering, December 5, 2003) to re-examine the soil cleanup levels at the site primarily based upon vapor-intrusion concerns (under the commercial/industrial future land-use assumption) that had not been previously addressed during the RI/FS risk assessment. The PRP group, via the Technical Memorandum, recommended that the cleanup levels for two soil contaminants, naphthalene and arsenic, based on updated toxicity values for these chemicals, be lowered from the ROD levels to be protective of human health under the original future-land-use assumptions in the ROD.

The Technical Memorandum also examined the City's desired future redevelopment plans in terms of protectiveness and concluded that a mixed-use redevelopment could

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<sup>4</sup>Chapter 11 (Reorganization) in December 2000 and then Chapter 7 (Liquidation) in August 2001.

be a proper future site reuse scenario if extra measures were taken at the site during or after the ROD remedial action (see next section).

EPA reviewed the Technical Memorandum and has accepted it for inclusion into the site Administrative Record. We have also placed the approved final soil design documents into the Administrative Record.

#### **IV. Significant Differences to the ROD Remedial Action**

##### **A. Revised Soil Cleanup Levels**

EPA used the RI/FS risk assessment to derive the ROD soil cleanup levels for the chemicals of concern. Based on a reasonable future land-use assumption of commercial/industrial, we estimated representative high exposure levels for site contaminants for (OMC's) future site workers and for construction or utility workers. We set a target excess cancer risk level of  $1 \times 10^{-5}$  for carcinogens and a hazard index of 1 was set for noncarcinogens. The selected soil remedial action was designed to clean up soil contaminants to achieve this cleanup goal.

EPA and Illinois EPA began remedial action consent decree (CD) negotiations with the PRP group in May 2003. During the negotiations, a question was posed as to whether the ROD soil cleanup levels would be protective under a plausible vapor intrusion exposure scenario. The City, as the new site owner, also raised the possibility of re-using the site for recreational purposes as well as its proposed mixed-use redevelopment goal. The PRP group responded by preparing the Technical Memorandum in which it re-examined the ROD soil cleanup levels with respect to updated toxicity values for the chemicals of concern, to apply the new vapor intrusion and recreation use scenarios, and to evaluate the proposed mixed-use redevelopment proposal. While the target risk levels remained the same for the RI/FS future land use assumptions, including the vapor intrusion scenario, the recreational use scenario was evaluated to set carcinogenic cleanup levels at an excess cancer risk of  $1 \times 10^{-6}$  for children.

The arsenic cleanup level was set at 940 mg/kg in the ROD. According to the Technical Memorandum, an updated noncarcinogenic reference value yielded a proposed new cleanup level of 639 mg/kg. Also, an updated naphthalene toxicity reference value was used to re-evaluate the ROD cleanup level of 48,556 mg/kg. Using the vapor intrusion scenario<sup>5</sup>, the PRP group derived a proposed new naphthalene cleanup level of 2,240 mg/kg. The rest of the ROD soil cleanup levels were found to be protective at the current levels (or higher) and the PRP group made no recommendation to change them.

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<sup>5</sup> naphthalene is a solid at ambient site temperatures



EPA agrees that the soil cleanup levels for naphthalene and arsenic can be lowered to the recommended levels in the Technical Memorandum (see Table 1). We have already determined that the ROD cleanup levels are protective of human health and the environment. Moreover, the lowering of the two soil cleanup levels is a proactive move on the part of the PRP group with respect to the updated toxicity reference values for arsenic and naphthalene and accounts for the uncertain future land uses, now that OMC no longer owns or controls the site.

Soil Contaminant	ROD Cleanup Level	Revised Cleanup Level
Arsenic	940 mg/kg	639 mg/kg
Naphthalene	48,556 mg/kg	2,240 mg/kg

**Table 1:** Revised soil cleanup levels

Approximately 40,000 cubic yards of soils will be excavated and treated or disposed of under the ROD remedial action. According to the PRP group, the revised soil cleanup levels would result in the excavation and disposal of less than 1,000 additional cubic yards of contaminated soil. There would be no change in soil treatment and/or disposal methods. Thus, the additional costs and time needed to clean up the soils to the lowered cleanup standards would be minimal in relation to the overall cost and schedule of the remedial action.

**B. Revised Future Site-Use Assumptions**

The City purchased the WCP property in July 2001 and, as the new owner, indicated that it wants to redevelop the property for mixed commercial, residential and marina-related uses ("mixed use") in accordance with its emerging lakefront redevelopment plans. The Technical Memorandum examined the mixed-use scenario with respect to additional remedial components that could be performed at the site to afford the mixed use redevelopment. The additional components are:

1. Revise and adhere to the SMP after the ROD soil remedial action is completed.
2. Place and maintain a 36-inch clean soil cover (or equivalent) over the WCP site where (new) buildings and paved areas will not be present.
3. Use and maintain engineered barriers such as pavement and building foundations to prevent exposure to residual soil contaminants.
4. Use and maintain vapor barriers and/or indoor vapor intrusion controls for inhabited buildings developed on the WCP site.
5. Place institutional controls (see Appendix 1) on the WCP site to prevent the use of groundwater until the groundwater meets federal and state drinking water standards.

The Technical Memorandum determined that the above additional components, in conjunction with the revised soil cleanup levels, would ensure that a mixed use redevelopment would be safely implemented at the WCP site and be protective of human health.

EPA agrees that the WCP site can be prepared for a future mixed-use redevelopment using the above additional remedial components to provide protectiveness to future site users. We agree that a combination of a 3-foot clean soil cover, asphalt or concrete parking lots and roadways, and concrete building slabs will greatly reduce the risk that people will be dermally or orally exposed to residual soil contaminants. The installation of vapor barriers along with the building foundations will also be protective measures to prevent exposure to residual soil contaminants. Under the remedial action CD, EPA would be provided with all necessary authority to require that the City, the PRP group, and future site owners comply with the requirements of the SMP, as revised and approved by EPA to support the mixed-use redevelopment, and with future operation and maintenance requirements.

Increasing the 6-to-10-inch soil cover thickness to 3 feet would not be a fundamental change to the remedial action because the method of completing the soils work would be the same - placing a clean soil cover over the residual contaminants. Also, the revised future land-use assumption (from commercial/industrial to recreational and/or mixed-use redevelopment) is not a fundamental change because no changes to the ROD soils cleanup levels are needed to afford the projected site reuses. We do not have a cost estimate for the additional components in terms of cleanup costs, as they could be instead construed as the costs of redeveloping the WCP site.

## **V. Support Agency Comments**

Illinois EPA has indicated that it generally concurs with the ESD and that a concurrence letter is forthcoming. EPA will place the concurrence letter into the WCP site Administrative Record upon receipt.

## **VI. Statutory Determinations**

EPA has determined that with the changes we have made to the ROD cleanup levels in this ESD, in accordance with CERCLA Section 121, the selected remedial action for the WCP site is protective of human health and the environment. It also complies with federal and state requirements that are applicable or relevant and appropriate, uses permanent solutions to the maximum extent practicable, and is cost-effective.

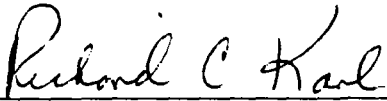
EPA has also determined that if the additional components listed in Section III, at a minimum, are applied to the WCP site, then the mixed-use redevelopment as contemplated by the City would be an appropriate site reuse scenario. The additional components would ensure that under a mixed-use redevelopment scenario the remedial action at the site would be protective of human health and the environment.

## VII. Public Participation Compliance

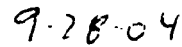
EPA shall publish a notice of availability and a brief description of this ESD in the local newspaper as required by NCP 300.435(c)(2)(i)(B). We will also place this ESD into the Administrative Record file and information repository located at the Waukegan Public Library as required by NCP 300.435.(c)(2)(i)(A).

## VIII. Declaration

EPA has determined that the adjustments to the WCP site ROD provided in this ESD are significant but do not fundamentally alter the overall site remedial action with respect to scope, performance, or cost. I therefore approve the issuance of this ESD for the WCP site and the changes to the remedial action stated herein.



Richard C. Karl, Director  
Superfund Division  
U.S. EPA Region 5



Date

State Concurrence Letter for the  
Explanation of Significant Differences

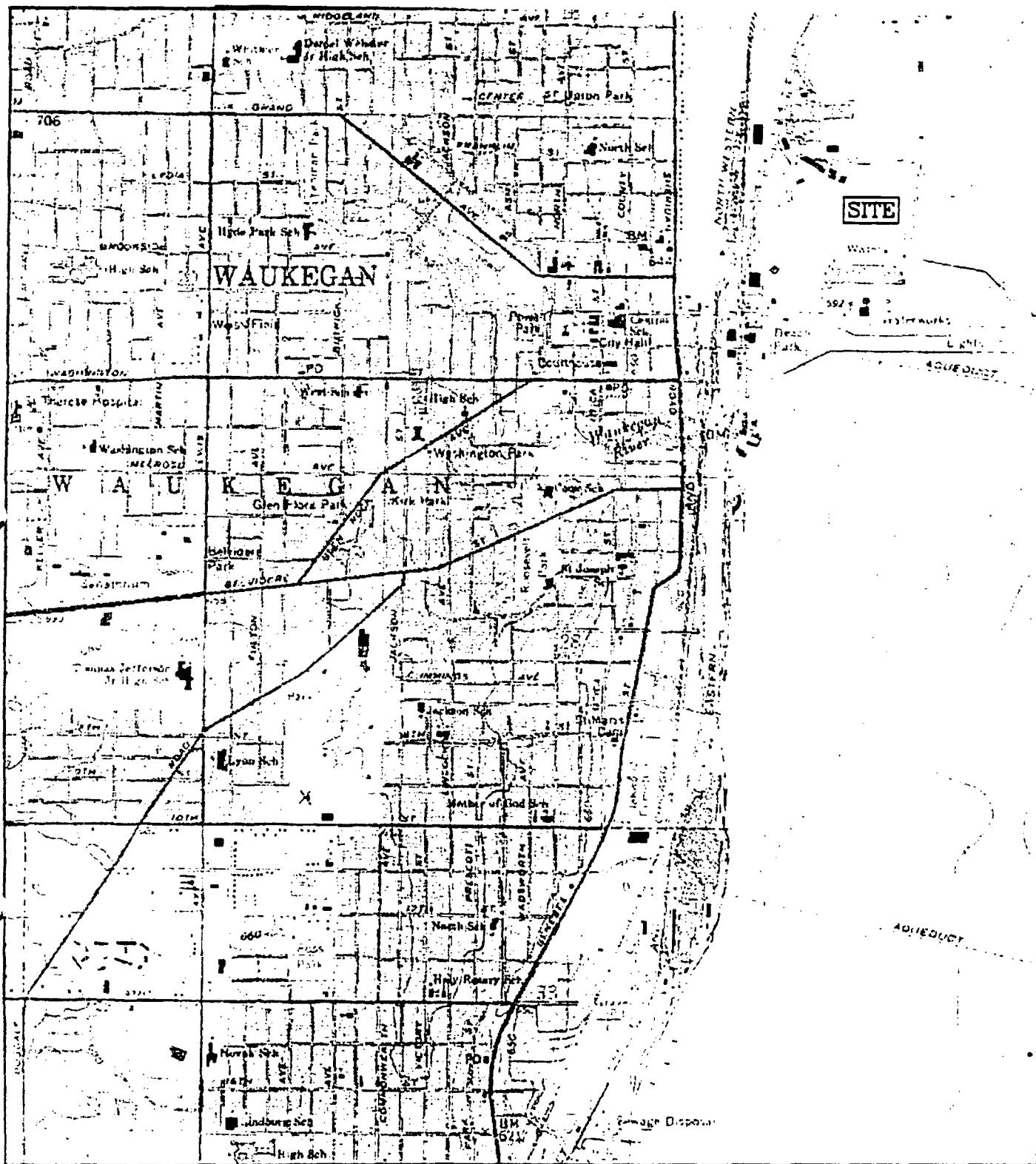
Waukegan Coke Plant Site

Waukegan, IL

## Figures

Waukegan Coke Plant Site

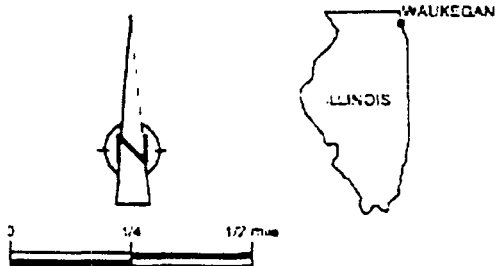
Waukegan, IL

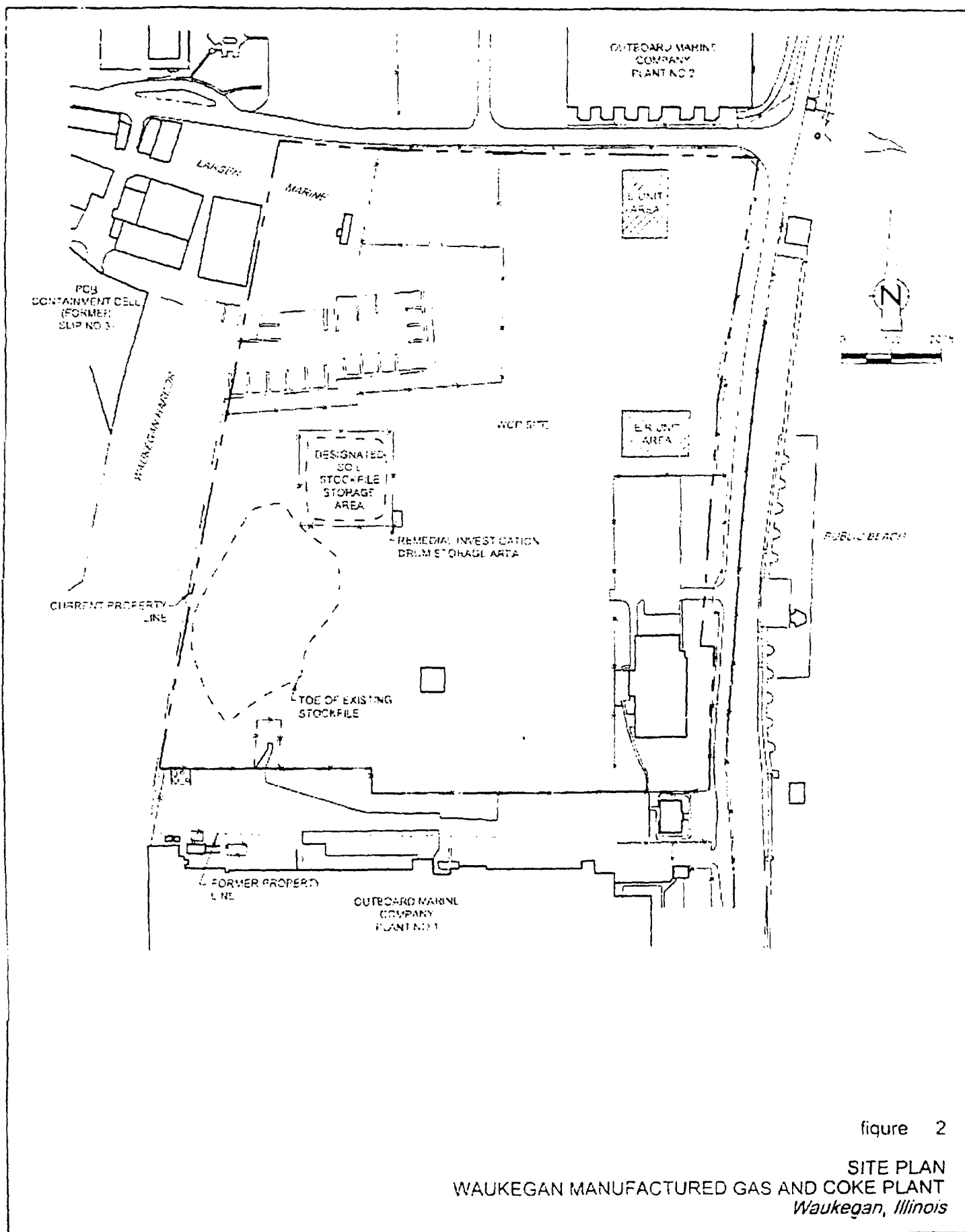


BASE SOURCE: USGS 7.5 MINUTE TOPOGRAPHIC QUADRANGLE;  
WAUKEGAN, ILLINOIS 1960

figure 1

SITE LOCATION  
WAUKEGAN COKE PLANT  
*Waukegan, Illinois*





## Appendix 1

### Institutional Controls for the Waukegan Coke Plant Site Waukegan, IL



## Institutional Controls for the Waukegan Coke Plant Site Waukegan, IL

EPA, Illinois EPA, and the Settling Defendants through the remedial action Consent Decree (CD) for the Waukegan Coke Plant (WCP) site, in accordance with the September 1999 Record of Decision (ROD), as modified by the September 2004 Explanation of Significant Differences (ESD), will place institutional controls (ICs) on the site to help protect human health and the environment. The ROD remedial action, in addition to the soil and groundwater cleanup actions, calls for ICs to be placed on the WCP site to prevent the use of groundwater until the groundwater meets federal and state drinking water standards. The ESD allows for site reuse in accordance with the ROD cleanup goals (commercial/industrial use) and/or for residential mixed-use development if further remedial work is performed and ICs are placed on the property so that the property is not used in conflict with any of the cleanup actions taken. These land-use restrictions, along with the soil and groundwater cleanup actions, will help prevent the public from coming into contact with or ingesting residual contaminants at the WCP site.

Appendix E of the CD presents the ICs for the site. The site-use restrictions include:

1. No disturbance of the soil cover and soils beneath the cover.
2. No interference with the implementation of the site cleanup remedy.
3. Restrictions on future land uses, in that the property shall not be used for:
  - a. residential purposes;
  - b. a hospital for humans;
  - c. public or private schools;
  - d. a day care center for children;
  - e. any purpose that involves occupancy on a 24-hour basis;
  - f. any use that would penetrate the soil cover;
  - g. any use that is prohibited by City ordinance; and
  - h. any use prohibited by the CD.
4. No use of groundwater unless approved by EPA and Illinois EPA.
5. No building construction unless the foundation is equipped with vapor controls.

The ICs will be recorded on the property deeds at the Lake County Recorder's Office. They will also grant a permanent environmental easement to EPA and Illinois EPA to access the site to ensure that the cleanup remedy is being performed in accordance with the CD and that the ICs are being adhered to by the property owners.

EPA and Illinois EPA will have enforcement authority in the ICs to ensure that they are being followed. The CD contemplates the creation of an Owners Association to help ensure that the ICs are being enforced. The CD also grants EPA and Illinois EPA enforcement rights in terms of cleanup implementation as well as applying ICs to the property.

## APPENDIX E

Prepared by:

Return to:

### DECLARATION OF ENVIRONMENTAL EASEMENT and RESTRICTIVE COVENANTS

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the Declarant, Larsen Marine Service, Inc. ("Larsen") [similar document for the City of Waukegan], declares this reservation of a Declaration of Environmental Easement and Restrictive Covenants ("Declaration") more particularly described as follows:

#### WITNESSETH:

WHEREAS, Larsen owns real property located in the County of Lake, State of Illinois, more particularly described on Attachment 1, which is attached and made a part hereof (the "Property"), that is part of the Waukegan Manufactured Gas and Coke Plant Site, Operable Unit 2 of the Outboard Marine Corporation Superfund Site, in Waukegan, Illinois ("the Site"), which the U.S. Environmental Protection Agency ("U.S. EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List ("NPL"), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658;

WHEREAS, in a Record of Decision dated September 30, 1999 (the "ROD"), the U.S. EPA Region 5 Regional Administrator selected a remedial action for the Site that provided, in part, for groundwater remediation and soil remediation, and also included a combination vegetative, asphalt and building cover for remediated and other portions of the Site, for the placement of land use restrictions on the Site, including the Property, and for development of a Soil Management Plan;

WHEREAS, General Motors Corporation and the North Shore Gas Company ("Performing Settling Defendants") have agreed to implement the remedial action at the Site, and Declarant has agreed to provide access to and implement certain land use restrictions on the Site, including the Property, as set forth herein and in a Consent Decree entered on \_\_\_\_\_, 200\_\_\_\_, ("Consent Decree") of *United States of America and the State of Illinois v. City of Waukegan, Illinois, Elgin, Joliet & Eastern Railway Company, General Motors Corporation, Larsen Marine Services, Inc. and the North Shore Gas Company*, Civil Action No. \_\_\_\_\_ (N.D. Ill.), which require the Declarant: 1) to provide a permanent right of access over the Site, including the Property, to the United States, the State of Illinois and the Performing Settling Defendants for purposes of conducting any activity related to the Consent Decree; and 2) to limit the use of the Property to prevent interference with or an adverse affect on the integrity or protectiveness of the remedial action to be implemented pursuant to the Consent Decree;

WHEREAS, the Consent Decree issued by U.S. EPA provides that modifications to land use at the Property including mixed use redevelopment (hereafter "Mixed Use Redevelopment") may be effected upon application by the City of Waukegan and upon the approval of a Revised Soil O&M Work Plan and Soil Management Plan by the U.S. EPA as provided by the Consent Decree and the Technical Memorandum regarding Revised Soil Cleanup Levels, prepared by Barr Engineering, Dated December 5, 2003 attached to the Consent Decree (the "Technical Memorandum"), the term "Soil Management Plan" in this Declaration meaning both the approved Soil Management Plan and any subsequently revised Soil Management Plan approved by U.S. EPA;

NOW, THEREFORE:

1. AGREEMENT AND RESERVATION: Declarant, on behalf of itself, its successors and assigns, does hereby reserve a right to restrict the use of the Property, the right to enforce said restrictions, a right of access and the right to an environmental easement over the Property, all as more particularly hereinafter set forth.

2. THIRD PARTY BENEFICIARIES: Declarant on behalf of itself and its successors, transferees and assigns hereby agrees that the United States, acting by and through U.S. EPA, and its successors and assigns, the State of Illinois, acting by and through Illinois EPA, and its successors and assigns, and Performing Settling Defendants shall be Third Party Beneficiaries of all the benefits and rights of the easements, reservations, restrictions, covenants, exceptions, notifications, conditions and agreements herein, and that the Third Party Beneficiaries shall have the right to enforce the easements and restrictions described herein.

3. PURPOSE: The purpose of this reservation is to retain in Declarant real property rights, which will run with the land, to facilitate the remediation required under the Consent Decree; to protect human health and the environment by reducing the risk of exposure to contaminants; to provide for the long-term protectiveness of the remedial action; and to accomplish these goals in a manner that allows the redevelopment and beneficial reuse of the Property consistent with the ROD, Technical Memorandum, Soil Management Plan, and any revisions thereto, and the Consent Decree. Unless otherwise indicated, the meaning of capitalized terms herein shall have the same meaning as that set forth in the Consent Decree.

4. RESTRICTIONS ON USE: The restrictions and covenants that follow apply to the use of the Property, run with the land for the benefit of the Declarant and the Third Party Beneficiaries, and are binding upon:

- (a) any party to whom the Property or a portion of the Property is conveyed (a "Grantee") and any assigns or persons acting under their direction and control; and
- (b) any subsequent owner, occupants or other person acquiring an interest in the Property and their authorized agents, employees, or persons acting under their direction and control.

4.1 No disturbance of cover: Except as provided in the Soil Management Plan (as incorporated into the Consent Decree) and except as provided in Paragraph 5, no action shall be taken to excavate or drill or intrude into, penetrate or otherwise disturb the cover on the Property as demarcated in the Soil Management Plan, which includes the vegetated soil cover, asphalt cover, or the soils below such vegetative soil cover or asphalt cover.

4.2 No interference with remedy: Except as provided in the Soil Management Plan, there shall be no interference, with the construction, operation, maintenance, monitoring or physical integrity of any component, structure, or improvement on the Property resulting from or relating to the remedial action implemented pursuant to the Consent Decree.

4.3 Land uses: Unless modified in accordance with paragraph 5 of this instrument and except for the existing uses, including but not limited to, existing water-oriented commercial recreational uses on the Property, the Property shall not be used for any of the following purposes:

- (a) residential, including any dwelling units and rooming units, mobile homes or factory built housing, camping facilities, hotels, or other unit constructed or installed for occupancy on a 24-hour basis;
- (b) a hospital for humans;
- (c) educational institutions such as a public or private school;
- (d) a day care center for children;
- (e) any purpose involving occupancy on a 24-hour basis;
- (f) any use that would disturb or penetrate the cover as described in subparagraph 4.1 or interfere with the remedy as described in subparagraph 4.2 (e.g. construction of buildings);
- (g) any use prohibited by ordinance adopted by the City in furtherance of its obligations under the Consent Decree; and
- (h) any use prohibited under or in violation of the Consent Decree recorded \_\_\_\_\_, 2004 at the Office of the Recorder of Deeds for Lake County, Illinois as Doc. No. \_\_\_\_\_, or the Soil Management Plan recorded \_\_\_\_\_, 2004 at the Office of the Recorder of Deeds for Lake County, Illinois as Doc. No. \_\_\_\_\_;

provided, that, the Property may be used for those purposes set forth in subsections 4.3(a) – (f) herein if, prior to the initial occupancy or prior to any activity that would excavate or disturb the soil, U.S. EPA, with the concurrence of Illinois EPA, determines that all the requirements set forth in the Soil Management Plan are satisfied and Larsen issues a certificate of occupancy.

Except in the case of Mixed Use Redevelopment, which approval shall be governed by the terms of the Consent Decree, no change shall be made to the land use restrictions in this subparagraph, except pursuant to the procedures set forth in Paragraph 5 of this instrument, and except with the consent of any other federal, state or local governmental agencies having jurisdiction over the proposed activities, and subject to applicable statutes, ordinances, rules and regulations in effect at such time.

4.4 Groundwater uses: No activities shall be conducted on the Property that extract, consume, or otherwise use any groundwater from the Property, unless approved by U.S. EPA with State of Illinois concurrence nor shall any wells be constructed on the Property for purposes other than ground water monitoring, unless approved by U.S. EPA with Illinois EPA concurrence.

4.5 Construction: There shall be no construction of any building, regardless of whether the building is intended for commercial/industrial, residential or mixed use, on the Property unless such building has been equipped with vapor controls in accordance with the Soil Management Plan.

4.6 Effective date of restrictions: The foregoing restrictions on use of the Property are subject to applicable statutes, ordinances, rules and regulations, and take effect upon the date of execution of this document and remain in effect until both U.S. EPA and the Illinois EPA issue a written determination to either modify or terminate the restrictions pursuant to Paragraph 5 below.

5. MODIFICATION OF RESTRICTIONS: The restrictive covenants in the preceding subparagraphs shall continue unless and until U.S. EPA, with the concurrence of Illinois EPA, approves the modification or rescission of these restrictive covenants or U.S. EPA approves modifications to the Soil Management Plan in accordance with the terms of the Consent Decree. U.S. EPA, with the concurrence of Illinois EPA, may modify or terminate, in whole or in part, the restrictions set forth in subparagraphs 4.1-4.6 in writing, as authorized by law. The owner of the Property may seek to modify or terminate, in whole or in part, the restrictions set forth in subparagraphs 4.1-4.6 by submitting to U.S. EPA, the State of Illinois and Declarant, a written application that identifies each such restriction to be terminated or modified, describes the terms of each proposed modification, and any proposed revisions to the environmental easement/restrictive covenants in this Declaration. Except in the case of a Mixed Use Redevelopment, which approval shall be governed by the terms of the Consent Decree, each application for termination or modification of any restriction set forth in subparagraphs 4.1- 4.6 shall include a demonstration by the owner of the Property that the requested termination or modification will not interfere with, impair or reduce:

- (a) the effectiveness of any remedial measures undertaken pursuant to the Consent Decree;
- (b) the long term protectiveness of the remedial action; or
- (c) protection of human health and the environment.

If U.S. EPA, with the concurrence of Illinois EPA, makes a determination that an application satisfies the requirements of this paragraph, including the criteria specified in (a) through (c), above, U.S. EPA will notify the owner of the Property in writing. If U.S. EPA does not respond in writing within 90 days to an application to modify or terminate any restrictions, U.S. EPA shall be deemed to have denied owner's application. Any modification or termination of these restrictive covenants shall be made in writing in recordable form and shall be recorded by the Party initiating the modification or termination with Recorder of Deeds, Lake County, Illinois. Each of Declarant and Performing Settling Defendants reserves its right to use the dispute resolution procedures in Section XIX of the Consent Decree concerning U.S. EPA's determination on an owner's application. Nothing in Paragraphs 4.3, 4.6 or 5 of this Declaration shall be construed as requiring additional approvals for a Mixed Use Redevelopment than those specified in the Consent Decree and to the extent of a conflict between Paragraphs 4.3, 4.6 and 5 and the Consent Decree, the terms of the Consent Decree shall control.

6. INTENTIONALLY OMITTED:

7. ENVIRONMENTAL EASEMENT:

- (a) Reserving to the Declarant, for its use and for the use of U.S. EPA, Illinois EPA and the Performing Settling Defendants, a perpetual and nonexclusive right of access at all reasonable times to the Property for the following activities:
  - (i) performance of the Work;
  - (ii) monitoring the Work;
  - (iii) verifying any data or information submitted to the United States or the State;
  - (iv) conducting investigations relating to contamination at or near the WMG & CP Site;
  - (v) obtaining samples;
  - (vi) assessing the need for planning, or implementing additional response actions at or near the WMG & CP Site;
  - (vii) implementing the Work pursuant to the conditions set forth in Paragraph 86 of the Consent Decree;
  - (viii) inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information) of the Consent Decree;

and access to only EPA and Illinois EPA and their contractors for the purpose of:

- (ix) assessing Settling Defendants' compliance with this Consent Decree; and
- (x) determining whether the WMG & CP Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to the Consent Decree; including, but not limited to, the institutional controls required by the Consent Decree.

8. NO LIMITATION OF RIGHTS OR AUTHORITIES: Nothing in this document shall limit or otherwise affect U.S. EPA's, Larsen's or the Illinois EPA's or the Illinois Attorney General's rights of entry and access or U.S. EPA's or the Illinois EPA's or the Illinois Attorney General's authority to take response actions under CERCLA, the National Contingency Plan, or other federal or state law.

9. NO PUBLIC ACCESS AND USE: No right of access or use by the general public to any portion of the Property is intended or conveyed by this instrument.

10. NOTICE REQUIREMENT FOR TRANSFER OF PROPERTY: Every instrument conveying any interest in any portion of the Property, including, but not limited to deeds, leases and mortgages, shall include a notice in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY:

(i) IS SUBJECT TO ACCESS RIGHTS AND LAND USE RESTRICTIONS CONTAINED IN A DECLARATION OF ENVIRONMENTAL EASEMENT AND RESTRICTIVE COVENANTS DATED \_\_\_\_\_, 2004 AND RECORDED \_\_\_\_\_, 2004 AT THE OFFICE OF THE RECORDER OF DEEDS FOR LAKE COUNTY, ILLINOIS AS DOC. NO. \_\_\_\_\_; A DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR (INSERT NAME OF CITY'S OWNER'S ASSOCIATION) DATED \_\_\_\_\_, 2004 AND RECORDED \_\_\_\_\_, 2004 AT THE OFFICE OF THE RECORDER OF DEEDS FOR LAKE COUNTY, ILLINOIS AS DOC. NO. \_\_\_\_\_; AND A SOIL MANAGEMENT PLAN DATED \_\_\_\_\_, 2004 AND RECORDED \_\_\_\_\_, 2004 AT THE OFFICE OF THE RECORDER OF DEEDS FOR LAKE COUNTY, ILLINOIS AS DOC. NO. \_\_\_\_\_. THESE RIGHTS AND RESTRICTIONS RUN WITH THE LAND AND ARE ENFORCEABLE BY THE UNITED STATES, THE STATE OF ILLINOIS AND THE CITY OF WAUKEGAN.

(ii) IS PART OF THE WAUKEGAN MANUFACTURED GAS AND COKE PLANT SITE, OPERABLE UNIT 2 OF THE OUTBOARD MARINE CORPORATION SUPERFUND SITE, WHICH IS AN NPL SITE; AND

(iii) THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY SELECTED A REMEDY FOR THE NPL SITE, INCLUDING THE PROPERTY, AND THE CITY OF WAUKEGAN ENTERED INTO A CONSENT DECREE ON \_\_\_\_\_, 2004 IN THE CASE OF **UNITED STATES OF AMERICA AND THE STATE OF ILLINOIS V. CITY OF WAUKEGAN, ILLINOIS, ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, GENERAL MOTORS CORPORATION, LARSEN MARINE SERVICES, INC. AND THE NORTH SHORE GAS COMPANY**, CIVIL ACTION NO. \_\_\_\_\_ (N.D. ILL.) RECORDED \_\_\_\_\_, 2004 AT THE OFFICE OF THE RECORDER OF DEEDS FOR LAKE COUNTY, ILLINOIS AS DOC. NO. \_\_\_\_\_, REQUIRING IMPLEMENTATION OF THE REMEDY AND RESTRICTIONS ON THE USE OF THE PROPERTY.

THIS CONVEYANCE IS ALSO SUBJECT TO COVENANTS, CONDITIONS AND RESTRICTIONS OF RECORD; PRIVATE AND PUBLIC UTILITY EASEMENTS; ZONING AND BUILDING LAWS AND ORDINANCES; ACTS OF THE GRANTEE AND GENERAL REAL ESTATE TAXES FOR 200\_\_ AND SUBSEQUENT YEARS.

11. ADMINISTRATIVE JURISDICTION: The federal agency having administrative jurisdiction over the interests acquired by the United States by this instrument is the U.S. EPA and any successor departments or agencies of the United States. The state agency having administrative jurisdiction over the interests acquired by the State of Illinois by this instrument is the Illinois EPA and any successor departments or agencies of the State of Illinois.

12. INSPECTION AND ENFORCEMENT: In addition to the access rights set forth in Paragraph 7 above, the United States, State of Illinois and/or the Declarant may enter the Property from time to time for the purposes of performing inspections, overseeing remedy implementation or enforcing the restrictions set forth in subparagraphs 4.1-4.6 above after permission from or reasonable notice to the owners or the owners' representative or, if applicable, the lessee. The Declarant and the United States and the State of Illinois as Third Party Beneficiaries shall be entitled to enforce the terms of this instrument in a judicial action seeking specific performance or other applicable remedies at law or in equity. The right to so enforce the conditions and restrictions in this instrument are in addition to any other remedies that may be available, including, but not limited to, remedies under CERCLA. Enforcing the terms of this instrument shall be at the discretion of the Declarant, the United States or the State of Illinois and any forbearance, delay or omission to exercise their rights under this instrument in



the event of a breach of any term of this Agreement shall not be deemed a waiver by the Declarant of the United States or the State of Illinois of such terms, or any other term, or any rights of the Declarant or Grantee or the Third Party Beneficiaries under this instrument. The easement and covenants shall inure to the benefit of the public in general and the Property and are enforceable by the Declarant, the United States and the State of Illinois.

13. RESERVATION OF DEFENSES: Nothing in this instrument shall be construed to enlarge the jurisdiction of state or federal courts or to create subject matter jurisdiction to adjudicate any claims against the U.S. EPA and the Illinois EPA or otherwise operate as a waiver of any sovereign immunity of the United States and the State of Illinois, and the United States and the State of Illinois expressly reserve all rights and defenses they may have in connection with any action initiated by Declarant pursuant to this instrument.

14. INTENTIONALLY OMITTED:

15. INTENTIONALLY OMITTED:

16. NOTICES: Any notice, demand, request, consent, approval, or communication that any party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Declarant:

Larsen Marine Service, Inc.

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To Third Party Beneficiaries:

United States Environmental Protection Agency  
Superfund Division  
77 W. Jackson Blvd.  
Mail Code: SR-6J  
Chicago IL 60604-3590

Illinois Environmental Protection Agency  
Federal Site Remediation Section  
Division of Land Pollution Control  
1021 N. Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276

[General Motors Corporation]

[North Shore Gas Company]

17. GENERAL PROVISIONS:

- (a) Controlling law: The interpretation and performance of the easements and restrictive covenants shall be governed by the laws of the United States and the State of Illinois, as applicable. The right to enforce the conditions and restrictions in this instrument are in addition to other rights and remedies that may be available, including, but not limited to, administrative and judicial remedies under CERCLA.
- (b) Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed to effect the purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.
- (c) Severability: If any provision of this instrument, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.
- (d) Entire Agreement: This instrument supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.
- (e) Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, 1) the parties hereto and their respective personal representatives, heirs, successors, and assigns as well as persons acting under their direction and control; and 2) any subsequent owner, occupants or other person acquiring an interest in the Property and their authorized agents, employees, or persons acting under their direction and control. The covenants, terms, conditions, and restrictions of this instrument shall continue as a servitude running in perpetuity with the Property. The rights of any Grantee under this instrument are freely assignable, subject to the notice provisions hereof. The rights of the U.S. EPA and Illinois EPA are freely assignable to any public entity, subject to the notice provisions hereof.
- (f) Captions: The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.
- (g) Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

18. OWNERS' ASSOCIATION: Declarant shall record at the Office of the Recorder of Deeds for Lake County, Illinois a Declaration of Covenants, Conditions and Restrictions for Owners Association ("Owners' Association Declaration") that subjects all of the Property to the terms of such Owners' Association Declaration and requires the creation of an Owners' Association that will be responsible for maintaining the Property in compliance with the terms of the Consent Decree, any appendices thereto, including but not limited to the Soil Management Plan, as such may be amended from time to time with the approval of U.S. EPA and the concurrence of the Illinois EPA, and any other institutional controls that are required by the Consent Decree. The Owners' Association Declaration shall also provide that the Owners' Association has the power to assess all owners of parcels on the Property for costs of compliance and the right to lien parcels for such assessments.

19. ATTACHMENT:

Attachment 1 - Legal description of the Property

LEGAL DESCRIPTION OF PROPERTY

(to be provided by Owner)

IN WITNESS WHEREOF, Declarant has caused this Declaration of Restrictive Covenants and Environmental Easement to be signed in its name.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

CITY OF WAUKEGAN

By: \_\_\_\_\_

STATE OF ILLINOIS                    )  
  ) ss  
COUNTY OF LAKE                    )

On this \_\_ day of \_\_\_\_\_, 200\_, before me, the undersigned, a Notary Public in and for the State of Illinois, duly commissioned and sworn, personally appeared \_\_\_\_\_, known to be the \_\_\_\_\_ of City of Waukegan, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

\_\_\_\_\_  
Notary Public in and for the  
State of Illinois

My Commission Expires: \_\_\_\_\_.

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